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BRUENIES, CHRISTOPHER P				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary**Application No.**

10/630,377

Applicant(s)

D'AMATO, GIANFRANCO

Examiner

CHRISTOPHER P. BRUENJES

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 March 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2-6, 8-13, 15-39 and 41-47 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 2-6, 8-13, 15-39 and 41-47 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/06)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submissions filed on December 17, 2007 and March 13, 2008 have been entered.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 2-6, 8-13, 15-26, 30-39 and 41-47 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-33 of copending Application No. 10/630,378. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of application '378 teach all that is claimed in the rejected claims of the pending application. Regarding claims 45-47, 4-6 and 8, claim 29 of application '378 teaches a container having all of the limitations of claim 45-47 and 4-6 of the current application in combination. Note at least one layer is taught by at least two layers because the limitation "at least one layer" includes any number of layers. Claims 2 and 9-10 are taught by claims 13 and 31 of application '378. Claim 3 is taught by claim 12 of '378. Claim 8 is taught by claim 5 of '378. Claim 11 is taught by claim 16 of '378. Regarding claim 12, the limitation that the two or more layers are coextruded is a method limitation and therefore receives little patentable weight in an article claim, since the final product is a laminated structure which is taught by '378 in claim 16. Also it would have been obvious to one having ordinary skill in the art at the time applicant's invention was made to form the multilayered container of '378 by lamination and/or coextrusion since both methods are notoriously well-known methods in the art for forming multilayered containers and that the particular method chosen is selected based on the intended end result and intended processing of the article. Regarding claims 13-26, these limitations are taught in claims 2-4, 6, 8-11, 15, and 17-19 of '378 respectively. Claims 30-31 are taught by claim 14 of '378. The limitations of claims 32-43 are taught by claims 21-30 and 32-33 of '378 respectively. Note the claims of the two applications are not conflicting because the independent claim of '378 requires that the container be

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collapsible and a specific combination of limitations in which the claims of '377 do not require even though the claims of '377 teach all of those limitations individually.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 2, 4-13, 15-26, 30-33, 36, 38-41 and 43-44 are rejected under 35 U.S.C. 102(b) as being anticipated by Yamada et al (WO 2000/28288). Note USPN 6,568,587 is used as the English equivalent for WO 2000/28288.

Regarding claim 45, Yamada et al anticipate a container for receiving food (col.1, 1.9-12 and col.6, 1. 5-7). The container has a wall comprising at least one layer (Figure 10). The container comprises a withdrawal opening with a bent opening edge (bent opening edge represented by the edge bending outward to glue the 2 dimensional object into its three-dimensional form - Figure 10) and being closed at its end opposite the withdrawal opening (Figure 7). The container wall is formed from a two-dimensional blank which is connected with itself for forming a continuous container wall (col.2, 1.39-43). The container wall is at least partially formed from a transparent material (col.2, 1.50-55). The material is liquid or fluid tight (col. 2, 1.55-59). The material is shaped for forming the container at both ends (Figure 7) and is

dimensionally stable after having been shaped, because the container retains its shape after being shaped (Figure 10). The container is dimensionally stable and fluid tight from -50°C to $+120^{\circ}\text{C}$, since the container is formed from a laminated film of stretched polypropylene and polyethylene, which are dimensionally stable and would be fluid tight based on their heat seal from -50°C to $+120^{\circ}\text{C}$.

Regarding claim 46, Yamada et al teach all that is shown above for claim 45 and in addition the opening edge is bent or rolled without the material changing its properties, since the material is still paper stock and transparent (Figure 10).

Regarding claim 47, Yamada et al teach all that is shown above for claim 45 and in addition teach more than one layer forming the wall and the opening is configured to be able to receive a removable lid in a sealing fashion. Note for the opening to be configured to receive a removable lid does not require that the container have a lid and does not present any substantial structural limitation to the opening because depending on the shape of the lid any opening could receive a removable lid in a sealing fashion.

Regarding claim 2, layer is formed from polypropylene (col.2, l.55-57).

Regarding claims 4 and 16, the container is made of paper sheet-like material and thin layers of polypropylene and polyethylene and is formed to be shape-retainable but requires a shape-retainer to hold shape when holding contents so the container wall is inherently flexible.

Regarding claim 5, the connection of the blank with itself is prepared by heat and/or pressure (col.1, l.59-61).

Regarding claim 6, the connection of the blank with itself is formed along an overlap region extending in the longitudinal direction of the container (Figure 10).

Regarding claim 8, the container wall comprises two layers each of the layers being transparent. One layer is formed of polypropylene and the other is formed of polyethylene (col.5, l.16-19).

Regarding claims 9 and 10, the polyethylene and oriented polypropylene layers form the inner layers so one of the layers is an outer layer because it is outside the other layer and the other layer is an inner layer because it is inside the other layer (col.5, l.16-19).

Regarding claims 11 and 12 and 15, the polyethylene and polypropylene layers are laminated on the paperboard layer because the broadest reasonable interpretation of laminated is that the layers are bonded to each other. Also, whether the layers are laminated by coextrusion or another method is not germane to patentability unless it is shown that there is an unobvious difference between the layers laminated according to Yamada et al and coextrusion. The layers are permanently joined.

Regarding claim 13, the unshaped blank is two-dimensional (Figure 7).

Regarding claim 17, the polypropylene and polyethylene layers together provide liquid tight and airtightness (col.5, l.16-19).

Regarding claim 18, the polyethylene and polypropylene layers connect at the overlap region (Figure 10).

Regarding claim 19, the edges of the layer are fluid tight, since the container is used to contain liquids and is required to be airtight, which are fluids.

Regarding claims 20-21, the container is provided with a print that is resistant to rubbing because the graduation lines and numbers are designed to remain on the measuring container (reference number 12, Figure 10).

Regarding claim 22, the print is provided on the outer side of a central layer or inner layer (col.5, l.20-21).

Regarding claim 23, one of the layers is ultrasonic absorbent because the layers are made of the same polyolefin materials taught by the claimed invention which are stated to be ultrasonic absorbent.

Regarding claim 24, what order the print is printed on the layers is not germane to patentability of the article unless it can be shown that there is an unobvious difference provided to the article by the print being printed prior to lamination rather than after lamination.

Regarding claim 25, two layers made of the same material bonded together has the same structure as one layer of the same material having the thickness of the two layers, so unless an unobvious difference can be shown one layer will be considered structurally the same as a laminates of itself.

Regarding claim 26, the closed end of the container is formed by connecting lower end sections of the wall (Figures 7 and 10).

Regarding claim 30, the print is printed on an outer side of the container (col.5, l.22-25).

Regarding claim 31, the print is printed on the polyethylene layer when printed on the inside member and because the print is facing the outside of the container it is the outer side of the container.

Regarding claim 32, paper stock formed into a paper cup inherently has some impact and/or puncture resistance. Note the claim does not specify an amount of impact and/or puncture resistance.

Regarding claim 33, the container has a square cross-section (Figure 10).

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Regarding claim 36, the print forms a control window on the wall (Figure 10).

Regarding claim 38, the opening edge is bent to the outside at an angle of 90° to the rest of the container wall (Figure 10). Note the claim does not specify which plane the bend is in.

Regarding claim 39, the opening is partially and/or in places continuously formed (Figure 10).

Regarding claim 41, the container can be stack and unstacked because it is a three dimensional object with a flat top and bottom. The container can be stacked and unstacked in the same manner as building blocks.

Regarding claim 43, a blank is taught for the manufacture of a container according to claim 1 (Figure 7).

Regarding claim 44, polyethylene and polypropylene are transparent fluid tight materials that remain transparently stable from -50°C to 120°C.

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

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2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
8. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yamada et al as applied to claim 40 in view of Matheson et al (USPN 5,078,313).

Yamada et al teach all that is claimed in claim 40 as shown above but fail to teach the layer is provided with a coat of lacquer on one or both sides. However, Matheson et al teach that paperboard containers are coated with a layer of lacquer onto the exterior surface to enhance a glossy appearance of the indicia printed on the container's exterior surface, giving it a look comparable to polymer coated containers. The exterior lacquer coating provides a moisture barrier (col.3, l.10-25). One of ordinary skill in the art would have recognized that lacquer coatings are added to the outer surface of paperboard containers to provide the container with enhanced aesthetic appeal by giving them a glossy appearance and the coating also provides moisture resistance for the container, as taught by Matheson et al.

Therefore, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to coat a lacquer on the exterior surface of the measuring container of Yamada et al to provide the container with a glossy appearance for aesthetic appeal and moisture resistance, as taught by Matheson et al.

9. Claims 27-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yamada et al as applied to claim 40 in view of Benson (USPN 1,654,318).

Yamada et al teach all that is claimed in claim 40 as shown above but fail to teach the closed end comprises a bottom insert. However, Benson teaches that is well known in the art to cap the bottom of a paper based container made from a two-dimensional blank with a bottom insert (p.2, 1.1-15). It would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to make an additional bottom insert from the same materials as the wall of Yamada et al in the same manner that Benson created the container from its two-dimensional blank because the bottom insert could provide extra strength at the bottom of the measuring container to hold the food or drink contents desired by Yamada et al.

Therefore, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add a bottom insert made from the same materials as the walls of Yamada et al which includes the transparent material to provide the container with enhanced strength in the bottom of the container.

10. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yamada et al as applied to claim 40 in view of Meyer (USPN 2,170,060).

Yamada et al teach all that is claimed in claim 40 as shown above but fails to teach that the material forming the container sidewall is not only transparent but also colored. However, Meyer teaches that is well known in the art to add color effects to at least the borders and edges of transparent containers in order to provide an enhanced decorative appeal to the transparent container (p.1, left hand column, lines 1-16). One of ordinary skill in the art would have recognized that Yamada et al and Meyer are analogous insofar as both references are concerned with forming transparent containers from two-dimensional blanks. Therefore, it would have

been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add color effects to at least the borders and edges of transparent containers formed from two dimensional blanks in order to provide an enhanced decorative appeal to the container, as taught by Meyer.

Thus, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add color to the transparent container of Yamada et al in order to enhance the decorative appeal of the container, as taught by Meyer.

11. Claims 34-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yamada et al as applied to claim 20 in view of McLaughlin (USPN 6,210,766).

Yamada et al teach all that is claimed in claim 40 as shown above but fail to teach that the container comprises printing having a three-dimensional effect or is a hologram. However, McLaughlin teaches that a container is provided with decoration and information for the user, especially in the form of a hologram or three dimensional effects. One of ordinary skill in the art would have recognized that Yamada et al and McLaughlin are analogous insofar as the references are concerned with forming a container from a two-dimensional blank. It would have been obvious to one having ordinary skill in the art to provide a container with printing in the form of a hologram or three dimensional effects in order to provide that container with decoration and/or information for the user of the container.

Therefore, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add printing such as a hologram or three dimensional effects

to one of the layers of the container of Yamada et al in order to provide the container with decoration and/or information for the user of the container, as taught by McLaughlin.

12. Claim 37 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yamada et al as applied to claim 20 in view of Clagett (USPN 2,689,424).

Yamada et al teach all that is claimed in claim 20 as shown above, but fail to teach that printing is applied to the container so that it is only visible after the food has been at least partially taken out of the container. However, Clagett teaches a drinking container in which two images are created in different colors so that one image is present when the beverage is present and the other image is present when the beverage is not present in order to provide a unique aesthetic appeal to the beverage container (col.1, lines 1-29). One of the prints of Clagett is only visible after the food has been taken out of the container (col.2, l.32-49). One of ordinary skill in the art would have recognized that Yamada et al and Clagett are analogous insofar as both references are concerned with forming containers having a sidewall in which the contents of the container can be seen through. Therefore, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add printing that is only visible after food is removed from the container in order to provide a unique aesthetic appeal to the drinking container, as taught by Clagett.

Thus, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add printing that is only visible after food is removed from the container of Yamada et al in order to provide a unique aesthetic appeal to the container, as taught by Clagett.

13. Claim 42 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yamada et al as applied to claim 40 in view of Halligan et al (USPN 4,574,987).

Yamada et al teach all that is claimed in claim 40 as shown above, but fail to teach forming at least one of the layers of the container as a heat insulating layer. However, Halligan et al teach that paper containers are formed with a heat insulating layer such as a layer of air (col.3, l.42-47) so that the container can be used to package food that is desired to remain colder or warmer than room temperature or the temperature at the surface of a person's hand (col.1, l.5-24). One of ordinary skill in the art would have recognized that Benson and Halligan et al are analogous insofar as both references are concerned with forming paper containers for receiving food or drink. Therefore, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add a heat insulating layer to a paper container for receiving food or drink in order to provide insulation between a food that is desired to remain colder or warmer than room temperature and/or the temperature at the surface of a person's hand, as taught by Halligan et al.

Thus, it would have been obvious to one having ordinary skill in the art at the time Applicant's invention was made to add a heat insulating layer to the container of Yamada et al in order to provide the container with the ability to be used to contain food or drink that is desired to remain at a colder or warmer temperature than the outside environment or the person's hand, as taught by Halligan et al.

14. Applicant's arguments filed March 13, 2008 have been fully considered but they are not persuasive.

In response to Applicant's argument that Yamada et al does not teach the collapsible as it is defined in the application, Applicant's claims do not require the container to be collapsible by any definition. Furthermore, because the container of Yamada is formed of paper and plastic it would be squeezable even if that is not the intention of the Yamada et al container.

In response to Applicant's argument that the container of Yamada et al is not suitable for receiving a lid, first the limitation is only required in claim 47. Second, the opening of the container of Yamada et al is suitable for receiving a lid depending on the shape and configuration of the lid, regardless of whether Yamada et al intends to place a lid on the container.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CHRISTOPHER P. BRUENJES whose telephone number is (571)272-1489. The examiner can normally be reached on Monday thru Friday from 8:30am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Christopher P Bruenjes
Examiner
Art Unit 1794

/Christopher P Bruenjes/
Examiner, Art Unit 1794
March 21, 2008